STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 15292

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, and PAUL KEARNEY, SR.,

Plaintiffs,

v.

TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; DAVID R. LEWIS *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session*; RALPH E. HISE *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

ORDER
DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

AND

DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

This matter comes before the undersigned three-judge panel upon the motion for preliminary injunction filed by Plaintiffs, the motion to dismiss filed by Defendants Moore, Berger, Lewis, and Hise ("Legislative Defendants"), and the motion to dismiss filed by Defendants the State of North Carolina and the North Carolina Board of Elections ("State Defendants").

In this litigation, Plaintiffs seek a declaratory judgment that Session Law 2018-144 (hereinafter "S.L. 2018-144"), which serves as the enabling legislation for the voter-ID related amendments made to Article VI of the North Carolina Constitution, violates several rights guaranteed elsewhere in the North Carolina Constitution on its face and as applied to Plaintiffs and other, similarly situated North Carolina voters who lack qualifying identification to vote. Plaintiffs also seek to enjoin S.L. 2018-144, which would allow registered voters who do not possess a qualifying ID to cast regular ballots at the polls.

Summary of Relevant Facts and Procedural History

In the 2018 General Election, North Carolina voters approved an amendment to Article VI of the North Carolina Constitution providing that "[v]oters offering to vote in person shall present photographic identification before voting," and that "[t]he General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. Const. art VI, §§ 2, 3. On December 19, 2018, the General Assembly enacted the requisite enabling legislation— S.L. 2018-144—over Governor Roy Cooper's veto. The Session Law lists, *inter alia*, the types of photographic identification that a voter may present to vote in accordance with the constitutional amendment, sets forth a process by which voters can obtain a free identification card at their county board of elections, and outlines a reasonable impediment process by which voters who do not possess a qualifying identification for one of several statutorily listed reasons may still vote by provisional ballot.

On the same day that the General Assembly enacted S.L. 2018-144, Plaintiffs filed their complaint in Superior Court, Wake County. In their complaint, Plaintiffs assert six claims in support of their request for declaratory and injunctive relief. Plaintiffs contend that the General Assembly violated Article I, Section 19 by intentionally enacting a racially discriminatory law (Claim I), that S.L. 2018-144 significantly burdens a "fundamental right to vote" (Claim II), that S.L. 2018-144 unconstitutionally creates different classes of voters (Claim III), that it infringes on their Article I, Section 10 right to participate in free elections (Claim IV), that it places a property requirement on the right to vote in violation of Article I, Section 11 (Claim V), and, finally, that it violates their assembly, petition, and speech rights under Article I, Sections 12 and 14 (Claim VI).

Plaintiffs filed their motion for preliminary injunction concurrent with their complaint. Legislative Defendants filed their motion to dismiss the complaint on January 22, 2019, and State Defendants filed their motion to dismiss the complaint and answer on February 21, 2019. Legislative Defendants contend that the complaint should be dismissed for lack of standing pursuant to North Carolina Rule of Civil Procedure 12(b)(1) because each Plaintiff either possesses a qualifying identification or would statutorily qualify to vote via the reasonable impediment process. Legislative Defendants move to dismiss the complaint pursuant to Rule 12(b)(6) on the grounds that each challenge is an as-applied instead of facial constitutional challenge and because each claim either lacks sufficient, supporting factual allegations or has no basis in the law. State Defendants argue in support of

their motion that Plaintiffs' Claims II-VI should be dismissed pursuant to Rule 12(b)(6) because Plaintiffs cannot meet their burden on a facial constitutional challenge of showing that there are no circumstances under which the law might be constitutional.

Due to the nature of Plaintiffs' claims, the Chief Justice of the Supreme Court of North Carolina transferred this case to the undersigned three judge panel on March 19, 2019 pursuant to N.C.G.S. § 1-267.1. On June 28, 2019, this panel heard oral arguments on Legislative Defendants' motion to dismiss, State Defendants' motion to dismiss, and Plaintiffs' motion for a preliminary injunction.

Applicable Legal Standards

"On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999)). North Carolina Courts will dismiss a complaint in whole or in part when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Id.* (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)).

A preliminary injunction "will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court,

issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

Because Plaintiffs challenge the facial constitutionality of S.L. 2018-144, the questions of whether they have stated claims upon which relief can be granted as to the motions to dismiss and of whether they have shown a likelihood of success on the merits for the purposes of a preliminary injunction must both be evaluated against the strong presumption of constitutionality afforded to acts of the General Assembly. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 168, 594 S.E.2d 1, 7 (2004) (citing *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002)). Because of this presumption, S.L. 2018-144 ultimately cannot be declared invalid based on any claim unless we determine that it is "unconstitutional beyond a reasonable doubt." *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (quoting *McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)).

Motions to Dismiss

Upon considering the complaint, the motions to dismiss pursuant to Rule of Civil Procedure 12(b)(6), and the supporting briefs, and taking the factual allegations in the complaint as true, we determine that Plaintiffs have made sufficient factual allegations to support Claim I, and that Claim I should not be dismissed as a matter of law. We also determine that Plaintiffs have failed to state

claims upon which relief can be granted as a matter of law in their Claims II-VI. We therefore dismiss those claims.

Furthermore, because we determine that Defendants' motions to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1) were addressed by Judge Rozier in his Amended Order dated March 14, 2019, and because this matter was referred to the panel based upon Plaintiffs' facial challenge to the constitutionality of S.L. 2018-144, we will not take up the issue of Plaintiffs' standing here.

Motion for Preliminary Injunction

Upon considering the pleadings, the parties' briefs, and the submitted affidavits and other supporting material, the majority of this panel agrees with Defendants that Plaintiffs have failed to demonstrate a likelihood of success on the merits of their sole remaining claim that enactment of S.L. 2018-144 violated their Article I, Section 19 equal protection rights. Therefore, Plaintiffs are not entitled to a preliminary injunction.

For the foregoing reasons, Defendants' motions to dismiss are DENIED as to Plaintiffs' Claim I and GRANTED as to Plaintiffs' Claims II, III, IV, V, and VI. Plaintiffs' motion for a preliminary injunction is DENIED.

This the 10 day of July, 2019.

Nathaniel J. Poovey, Superior Court Judge

Vince M. Rozier, Jr., Superior Court Judge

claims upon which relief can be granted as a matter of law in their Claims II-VI. We therefore dismiss those claims.

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This the 10 day of July, 2019.

Nathaniel J. Poovey, Superior Court Judge

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Judge O'Foghludha, concurring in part and dissenting in part.

Judge O'Foghludha agrees with the rest of the panel that Defendants' motions to dismiss should be denied as to Plaintiffs' Claim I and granted as to Plaintiffs' Claims II-VI; however, Judge O'Foghludha would grant a preliminary injunction on Plaintiffs' first claim. While recognizing that the State has a legitimate interest in preventing voter fraud and increasing voter confidence in the integrity of elections, *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), and indeed the State must implement laws mandating photographic identification pursuant to Sections 2 and 3 of Article VI of the North Carolina Constitution, the State has no legitimate interest in passing enabling legislation containing provisions already adjudicated to discriminate against minority voters, and that are likely to have a disproportionate impact on such voters, per the decision in *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

The Fourth Circuit in *McCrory* held that North Carolina's prior photographic ID law, denominated as H.B. 589 from the 2013-2014 Session, was passed with discriminatory intent, as that legislation excluded government-issued identifications (public housing and public benefit IDs) used disproportionately by African-American voters. *McCrory*, 831 F.3d at 235-36. Yet, these same forms of identification were again excluded in S.B. 824. Evidence presented to this Court, and considered solely on the issue of an injunction, confirms that the exclusion of these forms of identification from a list of acceptable forms of photographic ID

would again disproportionally affect African-American voters, and this Court should so hold.

Further, all parties agree that the only data on the impact of various forms of photographic ID voter requirements before the General Assembly during its consideration of enabling legislation pursuant to the Constitutional amendment was the same data used to pass H.B. 589—data that the Fourth Circuit held was used to disproportionately impact African-American voters. The legislature is therefore charged with knowledge that the exclusion of legitimate forms of government IDs such as public housing and public benefit IDs is discriminatory. A seemingly neutral law may be facially invalid under these circumstances, *S.S. Kresge Co. v. Davis*, 277 N.C. 654 (1971), and intent may be shown by either direct or circumstantial evidence in these circumstances, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Applying the *Arlington Heights* factors, namely that this law will likely bear more heavily on one race than another, and because of the current law's historical background and the sequence of events leading to its passage (the comparison with H.B. 589 and the passage of S.B. 824 between an election and the seating of those elected), Judge O'Foghludha would hold that Plaintiffs have shown a reasonable probability of success on the merits, *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393 (1983), and that the issuance of an injunction is necessary to protect Plaintiffs' rights during the litigation. In weighing the equities for and against an injunction, Judge O'Foghludha would hold that the reasonable likelihood of disproportionate

impact on minority voters would outweigh the likelihood of actual in-person voter fraud, as the risk of the latter, based on historical data, approaches zero. Further, the implementation of photographic voter ID pursuant to the constitutional amendment has already been delayed by further legislation until 2020, and the likelihood of voter confusion between disparate methods of in-person voting in 2019 and 2020 would be obviated by the preservation of the status quo during the pendency of this litigation. *See* Brinson Bell Dep. 74-75, 78-79. Any disruption of efforts by the State Board of Elections to prepare for the ultimate implementation of some kind of photographic voter ID can be accommodated by this Court by the crafting of flexible exceptions to injunctive relief, such as allowing for the continued updating of the State's SEIMS system and the continued development of internal SBOE policies relevant to photographic voter ID. *See* State Defs.' Resp. to Pls.' Mot. for Prelim. Inj. 13.

Michael J. O'Foghludha, Superior Court Judge